IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.90 OF 2005.

Sterlite Optical Technologies Ltd.and Anr. ... Appellants.

V/s.

Commissioner of Central Excise Aurangabad & Ors. ... Respondents.

Mr Harish Salve, Senior Counsel with Rohan Shah, Tarun Gulate with Madhur Baya for the Appellants.

Mr M. I. Sethna, Senior Counsel with A. M. Sethna & S. D. Bhosale for the respondents.

CORAM : DR.S.RADHAKRISHNAN and V.C.DAGA, JJ.

DATED : 3rd May 2007.

JUDGMENT :(Per: VIJAY DAGA,J)
---

1. Heard. Perused appeal.

2. This is appeal filed under Section 35G of the Central Excise Act, 1954 read with section 130 of the Customs Act, 1962 (hereinafter referred to as "the Excise Act" and "the Customs Act" for short), at the instance of M/s.Sterlite Optical Technologies Ltd. ("the appellant" for short) against the final order and judgment dated 17.6.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal ("the Tribunal" for short) raising various contentions, giving rise to the substantial questions of law framed

by this Court in the order dated 8th February, 2007. The details of which, at this stage, are not necessary.

3. On being noticed, the respondent/Commissioner of Customs and Sales Tax, Aurangabad (Maharashtra) appeared and resisted appeal and raised a preliminary objection to the maintainability thereof contending that the appeal directly and substantially raises questions relating to rate of duty and valuation of the goods, as such instant appeal would lie to the Hon'ble Supreme Court under Section 35-L of the Central Excise Act read with Section 130 of the Customs Act, and not before this Court.

BACKGROUND FACTS:-

4. Before adverting to the rival contentions, it is necessary to sketch background facts, in short;

5. The appellant is engaged in the manufacture and sale of Optical Fibre. In a buoyant international market, the Appellant had carried out exports to the tune of Rs. 276 Crores for the year ended on 31.3.2001. This led the appellant to set up a 100 % Export Oriented Unit (EOU) (E-3 Unit) adjacent to it's Domestic Tariff Area (DTA) unit (E-2 unit). However, while the 100% EOU unit was being set up, the international market for Optical Fibres crashed and

many leading players like Lucent, Pirelli etc., in the Optical Fibre business were forced to shut down their operations. While the international telecom market had crashed, the Indian telecom market was on the cusp of tremendous growth given the fact that India was setting up new telecom infrastructure by laying Optical Fibre throughout the country.

6. Given the prevailing market conditions, the Appellants exercised the option available under Para 6.20 (d) of the EXIM policy to apply for a migration of their Unit from the EOU Scheme to the EPCG Scheme, by getting its 100% EOU unit debonded by treating the capital goods imported under the EOU Scheme as imported under the EPCG Scheme. The said application was made by the Appellant on 6.10.2001, even while the plant and machinery for the unit were still being imported and set up.

7. The pending consideration of the above application made by the appellant dated 16.10.2001, the petitioner was required to invoke writ jurisdiction of this Court by moving Writ Petition No. 5884/2002 seeking orders directing authorities to pursue the issue of E.P.C.G., Licence which, ultimately, laid to various orders of this Court dated 27th February, 2003, 25th March, 2003 and 8th

April,2003 directing authorities to issue E.P.C.G. Licence. The E.P.C.G. license was, ultimately, issued on 22.4.2003.

8. The Revenue not satisfied with one of the orders of this Court, dated 10th December, 2002 carried Special Leave Petition No. 3647/2003 and also challenged therein subsequent order dated 7th July, 2003 referred to hereinabove. The Hon'ble Supreme Court by its order dated 21st April, 2003, dismissed the S.L.P. Thereafter, this Court by order dated 7th July, 2003 directed the issuance of the debonding of the appellant's hundred per cent E.O.U. Unit. The Unit was finally debonded on 10th July,2003.

9. On debonding of the goods and consequent to the E.P.C.G. Scheme, Customs Authorities assessed the customs duty which, ultimately, resulted in show cause notice and adjudication thereof vide order in original dated 7.12.2003; challenged in appeal resulting in the impugned order of the Tribunal dated 17th June, 2005, which is the subject matter of challenge in the present appeal.

10. The maintainability of which, before this Court, under Section 35G, is a core issue raised in the preliminary objection; which alone is the subject

matter of this order.

RIVAL SUBMISSIONS -

11. Mr Sethna, learned Senior Counsel appearing for the Revenue, in support of the preliminary objection placed reliance on Section 35 (G) and (L)of the Central Excise Act of which relevant part read as under:-

SECTION 35G. - APPEAL TO HIGH COURT :-

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment),if the High Court is satisfied that the case involves a substantial question of law. (2) to (9)....(not relevant).

SECTION 35L. APPEAL TO THE SUPREME COURT :-

An appeal shall lie to the Supreme Court from - (a) any judgment of the High Court delivered -

(i) ....

(ii) ....

(iii_ ....

(b) any order passed by the Appellate Tribunal relating, among other things to the determination of any question having a relation to the rate of duty or excise or to the value of goods for purposes of assessment.

12. Mr Sethna contends that the Parliament in it's wisdom having provided an appeal to the Highest Court of the land by incorporating Section 35L in the Central Excise Act, the appellant, therefore, has a right of appeal to the Supreme Court and not to this Court as the issues raised in the appeal relate to the rate of duty and valuation of goods. He submits that as far as the valuation aspect is concerned, dispute between the parties relates to the assessable value based on the transaction value/valuation concept as contended by the Revenue; as against this; the value of contemporaneous import is the contention of the appellant. In his submission, there is also a dispute regarding valuation of intermediate product viz. principally; deperform.

13. Mr Sethna, while taking us through the order of the Tribunal tried to impress upon us, that the dispute between the parties relates to the valuation of both the optical fibre i.e. finished goods and that of the intermediate products; i.e. the deperforms. In his submission, the actual issue for determination as contended by the appellant is: whether applicable rate of duty would be under Section 3, or under proviso to Section 3(1) of the Central Excise Act. He submits that to determine the issue in question on the touchstone of theory of relate back; the various compliances of the requirements, as stipulated under various notifications; and benefits thereof which the appellants are claiming, will have to be examined. Thus, in his submission, the issue also relates to the question of exemption.

14. Mr Sethna, learned senior counsel for the revenue heavily relied upon the Judgment of the Apex Court in the case of **Navin Chemicals Mfg. & Trading Co. Ltd. v. Collector of Customs, 1993 (68) E.L.T. 3 (S.C.) followed by this Court in the case of Union of India 2002 (142), E.L.T. 292 (Bom)**.

15. Per contra, Mr Harish Salve, learned Senior Counsel appearing for the appellant urged that the issue of status as EOU or EPCG unit would determine a

host of issues relating to the quantum; periodicity; monitoring of the export obligation with the designation for the proper administration of the unit etc. The determination of status would also determine whether the levy and collection of excise duty would be under Section 3(1) of the Central Excise Act, as a domestic manufacturing unit (holding of EPCG licence) or under the proviso to Section 3(1) of the said Act, by considering the clearances as a deemed import in respect of the unit having status of an E.O.U.

16. According to Mr Salve, in the present case, the direct and proximate questions that require determination are questions of status and the question of date from which such status would become applicable. Consequently, according to him, in terms of the law declared in **Navin Chemicals' case** (supra), it is this Court which alone has a jurisdiction to hear and deal with the questions raised in the instant appeal. He reiterates that the issue of valuation is not direct and proximate issue involved in the appeal. In his submission, the issue of status is the only issue which is directly and proximately involved in the appeal. All other issues, according to him, would flow incidentally post the determination of the direct and proximate issue of status.

17. In rejoinder, Mr Sethna submits that considering the factual matrix as demonstrated by the chronology of the events, it is crystal clear that to consider the issue of status, two important aspects are required to be considered, viz;

(a) Firstly, that issue becomes a question of merit and

(b) Secondly, even the issue of status after the same is determined, has a direct and proximate relationship to the determination of rate of duty for the purposes of assessment, as held by the Hon'ble Supreme Court in **Navin Chemicals** (supra)

18. Mr Sethna, thus, submits that this Court has no jurisdiction to entertain and try the subject appeal.

CONSIDERATION:-

19. Having heard rival parties on the preliminary objection referred hereinabove,it is not in dispute that the appellant was E.O.U. The impugned order has been passed demanding duty and imposing penalty on

them on the ground that the goods were cleared to the Domestic Tarrif Area (D.T.A.) contrary to the provisions of the Act. The issues raised and catalogued by the appellants themselves in their written submission are reproduced hereinbelow to consider the strength of the preliminary objection raised by the Revenue.

1. Whether the appellant can be asked to pay excise duty at a higher rate as applicable for the alleged DTA clearances from an EOU under the proviso to Section 3 of the Excise Act?

2. Whether or not demand of both customs duty and additional excise duty beyond the 16% already paid is inconsistent and incorrect and whether it should have been set aside by the Tribunal?

3. Whether the debonding of E.O.U. unit has to relate back to the date of import or the application for debonding i.e. to 6.10.2001?

4. Whether or not the proviso to Section 3 can be applied to the production anterior to the date of commencement of the commercial production?

5. Whether or not the demand of duty prior to March, 2002 is legal and valid?

20. The Apex Court in the case of **Navin Chemicals** (supra) has held, as follows:-

"It will be seen that sub-section (5) uses the

> said expression 'determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment' and the explanation thereto provides a definition of it for the purposes of this sub- section'. The explanation says that the expression includes the determination of a question relating to the rate of duty; to the valuation of goods for purposes of assessment; to the classification of goods under the Tariff and whether or not they are covered by an exemption notification; and whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matters that the said Act provides for. Although this Explanation expressly confines the definition of the said expression to sub-section (5) of Section 129D, it is proper that the said expression used in the other parts of the said Act should be interpreted similarly. The statutory definition accords with the meaning we have given to the said expression above. Questions relating to the rate of duty and to the value of goods for purposes of assessment are questions that squarely fall within the meaning of the said expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purposes of assessment, questions arise directly and proximately as to the rate of duty or the value of the goods."
>
> (Emphasis supplied)

21. Following the aforesaid decision, this Court in the case of **Union of India Vs. Auto Ignition Ltd.** ruled that whereever the dispute as to whether notification is applicable or not is raised, then the

appeal would not be maintainable before this Court.

22. The word "assessment" is used as meaning sometimes the computation of rate of duty, sometimes the assessable value of goods and sometimes the whole procedure laid down under the Act for imposing duty liability upon the manufacturer or importer. The word assessment is, thus, capable of bearing a very comprehensive meaning; in the context, it can comprehend the whole procedure for ascertaining and imposing duty liability. The word "levy" was interpreted by the Supreme Court in the case of **Asstt.Collector of Central Excise Vs. National Tobbaco of India Ltd. A.I.R. 1972 S.C. 2563** as embracing within it the process of assessment and also imposition of tax. The term ’levy’ appears to be wider in it’s import than the term ’assessment’. It may include with "imposition" of tax as well as ’assessment’.

23. Considered on the above backdrops, the question of determination of status of the subject Unit will be one of the steps in the process of assessment. This exercise would be an exercise; which can be said to be part of the assessment. In this view of the matter, in our view, the dispute involved in the appeal and the substance thereof is:

what should be rate of duty on the goods cleared to the Domestic Tarrif Area (D.T.A.). We have, thus, no hesitation to hold that the direct and proximate issues involved in the appeal for the purposes of assessment relate to the rate of duty applicable to the goods and the value thereof and the issue requiring determination of the status of the subject Unit would be one of the incidental issues. The contentions raised by the appellants, catalogued in para (19) supra, also revolve around the rate of duty and valuation of goods for the purposes of assessment.

24. For the reasons recorded herein, we sustain the preliminary objection raised by the Revenue and hold that the subject appeal is not tenable before this Court.

25. Needless to mention that no contentions were advanced by either of the parties on the merits of the appeal nor the same are considered by us.

26. In the result, the appeal is dismissed, as not tenable without prejudice to the rights of the appellant to approach appropriate forum so as to claim reliefs prayed in this appeal. No order as to costs.

(V.C.DAGA,J) **(DR.S. RADHAKRISHNAN,J)**